

Montana Water Court
PO Box 1389
Bozeman, MT 59771-1389
1-800-624-3270
(406) 586-4364
watercourt@mt.gov

FILED
02/28/2023
Sara Calkins
CLERK
Montana Water Court
STATE OF MONTANA
By: D'Ann CIGLER
43B-0701-R-2022
Lambert, Kathryn
4.00

MONTANA WATER COURT, YELLOWSTONE DIVISION
YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK BASIN
BASIN 43B
PRELIMINARY DECREE

CLAIMANTS: ~~Jennie L. Weber;~~ Robert L. Weber

CASE 43B-0701-R-2022

43B 101036-00

OBJECTORS: Robert L. Weber

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusion of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must mail a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

Robert L. Weber claim 43B 101036-00 appeared in the Preliminary Decree with the following remark:

CLAIMANT CONSIDERS TRAIL CREEK DITCH AS A SOURCE AND IDENTIFIES POINT OF DIVERSION ON SAME.

Robert L. Weber objected to the flow rate. At the November 18, 2022 scheduling conference, it was determined that no additional information was needed to address and resolve the issue remark and objection. The December 13, 2022 Court Minutes for the November 18, 2022 scheduling conference is viewable in the Court's FullCourt Enterprise case management system.

APPLICABLE LAW

Judicial notice is taken of the priority date index for the Basin 43B Preliminary Decree issued by the Montana Water Court on May 9, 2019. Rule 202(4) and (6), M.R.Evid.

A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content pursuant to section 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect including for claimants objecting to their own claims. Rule 19, W.R.Adj.R.

FINDINGS OF FACT

1. The Preliminary Decree states that the source for all three points of diversion is TRAIL CREEK. As stated in the December 13, 2022 Court Minutes, the Court reviewed the scanned copies of the claim file but could not find a basis for the issue remark and claimant Robert L. Weber confirmed that each of the three points of diversion are on Trail Creek. The issue remark should be removed as erroneous.

2. The Statement of Claim and the Temporary Preliminary Decree both state that the flow rate is 3.75 cfs (the equivalent of 150.00 miner's inches) for a December 31, 1881 use right. During the Temporary Preliminary Decree proceedings, this claim and its objections were consolidated as Case 43B-237. During the Case proceedings, the right claimed was changed to the April 1, 1878 150.00 miner's inch right decreed in *Holliday et al. v. Rankin et al.*, Cause No. 283, Sixth Judicial District in and for Park County. The flow rate was reduced to 1.88 cfs (the equivalent of 75.00 miner's inches). These changes were based on the Stipulation filed on March 20, 1991 by the parties in that Case. In particular, paragraph 6 of the Stipulation states:

6. That Claim No. 101036 of the R. Webers should be adjudicated into two separate rights held by two separate owners, as follows:

Claim No. 101036a:

Owner: Robert L. and Jennie L. Weber
Flow Rate: 1.88 cfs
Priority Date: 4/1/1878
Point of Diversion: SENENW Section 25, T4S, R8E;
NENWNE Section 17, T4S, R9E

Claim No. 101036b:

Owner: Church Universal and Triumphant, Inc.
Flow Rate: 1.88 cfs
Priority Date: 4/1/1878
Point of Diversion: SENENW Section 25, T4S, R8E

The Master's Report for the Case was filed on August 5, 1994. Paragraph 16 states:

16. Paragraph 6 of the Stipulation specifies the generation of an implied claim for the Church from this Weber Statement of Claim. As there appeared to be no basis for generating such a claim the Court requested briefs or argument supporting this request from the parties. The March 24, 1994 Order Setting Deadline directed that any such additional documentation was to be filed by April 24, 1994. No such additional documentation was filed.

Implied claims are generated when it is apparent from the Statement of Claim, as originally filed, that the claimant mistakenly included more than one water right on the claim form. To allow the Webers to amend their claim to include a second water right, then generate an implied claim for that right, would be inappropriate. Implied claims are generated to remedy mistakes where the claimant filed for all their rights, but put too many rights on a form. They are not generated to remedy a claimants failure to file a claim for a water right.

In this case, there is nothing in Statement of Claim 43B-W-101036-00 referring to the April 1, 1878 decreed right for 1.88 cfs. *The Church will have to amend one of its claims to reflect this right or file a late claim.*

(*Emphasis added.*) The Order Adopting Master's Report was issued on November 13, 2002.

3. The Weber objection explains the reason for the objection as follows:

In order to break an 8 yr. impasse w/Church Universal we offered ½ of 101036 to become 101036a and 101036b. The "Church" accepted 10106b. Comes Judge Lobel and said it was illegal to split a water right, and gave the Church 30 days to respond. They did not so my right reverts to the original 150 m.i.

4. As memorialized in the December 13, 2022 Court Minutes:

For the objection, Mr. Weber reiterated that during the Temporary Preliminary Decree proceedings, they offered to reduce the flow rate by half and allow the

Church Universal & Triumphant to file a claim for the other half but the Church never filed a claim. The objection requests restoration of the flow rate as it appeared in the Temporary Preliminary Decree. The Court noted that the Preliminary Decree priority date index was reviewed and there are no Church claims filed with the priority date of this decreed right.

5. A review of the Preliminary Decree priority date index shows there is no Church Universal & Triumphant claim with an April 1, 1878 priority date. It appears no claim was amended to that priority date and no late claim was filed for that priority date.

6. The Preliminary Decree states that the flow rate is 1.88 CFS. The flow rate should be restored to 3.75 CFS.

7. The Preliminary Decree also includes the following notice remark:

THE TIMELY FILED OBJECTION OF ROBERT L. WEBER WAS AMENDED BY AGREEMENT OF THE PARTIES TO INCLUDE PLACE OF USE AND MAXIMUM ACRES BECAUSE THESE ELEMENTS WERE NOT INCLUDED ON THE OBJECTION LIST, ANY WATER USER WHOSE RIGHTS MAY BE ADVERSELY AFFECTED BY ENFORCEMENT OF THESE CHANGES MAY PETITION THE APPROPRIATE COURT FOR RELIEF OR MAY FILE AN OBJECTION AT THE PRELIMINARY DECREE.

This remark provides notice of these changes made during the Temporary Preliminary Decree proceedings. The remark does not raise unresolved issues which need to be addressed.

There are no proceedings required for this remark. The remark should be removed as having served its notice purpose.

CONCLUSION OF LAW

The contents of the claim file and the information provided by the claimant as memorialized in the December 13, 2022 Court Minutes are sufficient to restore the flow rate and to resolve the issue remark without evidentiary hearing. Sections 85-2-248(3) and (11), MCA.

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusion of Law, this Master recommends that the Court make the changes specified in the Findings of Fact to correct the Preliminary Decree for this Basin. A Post Decree Abstract of Water Right Claim is served with this Report to confirm the recommended changes have been made in the state's centralized record system.

ELECTRONICALLY SIGNED AND DATED BELOW

Service via USPS Mail:

~~Jennie L. Weber~~

Robert L. Weber
4417 Old Yellowstone Trail N
Livingston, MT 59047-8805

Note: Caption and Service List Updated 2-21-23

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B

Water Right Number: 43B 101036-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: ROBERT L WEBER
4417 OLD YELLOWSTONE TRAIL N
LIVINGSTON, MT 59047 8805

***Priority Date:** APRIL 1, 1878

Type of Historical Right: DECREED

Purpose (use): IRRIGATION

Irrigation Type: FLOOD

***Flow Rate:** 3.75 CFS

AS PREVIOUSLY ADJUDICATED IN HOLLIDAY, ET AL. V. RANKIN, ET AL., CAUSE 283, DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT IN AND FOR PARK COUNTY, AND AS SPECIFIED IN THE PARTIES' MARCH 21, 1991 STIPULATION, THE FLOW RATE IS TO BE MEASURED AT THE POINT WHERE THE WATER REACHES THE CLAIMANT'S PLACE OF USE NOT AT THE POINT OF DIVERSION. FROM MASTER'S REPORT FOR CASE 43B-237, FILED 8-5-1994.

***Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 3 - MODERATE

***Maximum Acres:** 137.00

***Source Name:** TRAIL CREEK

Source Type: SURFACE WATER
ALSO KNOWN AS TRAIL CREEK, NORTH FORK

***Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SENENW	25	4S	8E	PARK
Period of Diversion:	MARCH 15 TO NOVEMBER 15					
Diversion Means:	HEADGATE					
Ditch Name:	HIGHLINE DITCH					
2		SENENW	25	4S	8E	PARK
Period of Diversion:	MARCH 15 TO NOVEMBER 15					
Diversion Means:	HEADGATE					
Ditch Name:	BRISCOE DITCH					
3		NENWNE	17	4S	9E	PARK
Period of Diversion:	MARCH 15 TO NOVEMBER 15					
Diversion Means:	HEADGATE					

THE CLAIMANT MAY DIVERT ANY OF ITS WATER RIGHTS FROM TRAIL CREEK THROUGH ANY OF ITS POINTS OF DIVERSION CLAIMED ON ANY OF THOSE RIGHTS. FROM MASTER'S REPORT FOR CASE 43B-237, FILED 8-5-1994.

Period of Use: MARCH 15 TO NOVEMBER 15

***Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	22.00		SWSW	8	4S	9E	PARK
2	23.00		SESW	8	4S	9E	PARK
3	32.50		N2SW	8	4S	9E	PARK
4	2.50		SWSE	8	4S	9E	PARK
5	30.00		NWSE	8	4S	9E	PARK
6	27.00		SESE	8	4S	9E	PARK
Total:	137.00						

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

101035-00

101036-00

101037-00